United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 13, 2007

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Albertsons, Inc.
Case 31-CA-27552, et al.

240-3367-1787
512-5009-6733
512-5081-7000
524-5056-0800
530-6067-2040-8029
596-0420-5087
596-0420-5500
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596-3212-9100

The Region submitted these cases for advice as to whether:

(1) Section 8(a)(3) and (5) charges related to a 2003-2004 lockout are barred by Section 10(b) of the Act;

(2) the Section 8(a)(3) and (5) charges should be dismissed based on the parties' Labor Dispute Settlement Agreement ("LDSA"), in which the Unions waived the right to file Board charges over issues arising out of the 2003-2004 labor dispute;

(3) the Employer violated Section 8(a)(3) and (5) by selectively rehiring unit employees during the lockout, and/or by failing to pay contributions to Union trust funds on behalf of rehired employees; and

(4) the Employer violated Section 8(a)(1) and (4) by filing a grievance alleging that the Union's unlawful lockout charge violates the LDSA.

We agree with the Region that all of the charges in the instant cases should be dismissed, absent withdrawal. Thus, we agree with the Region that:

(1) the unlawful lockout and fund contributions charges should be dismissed as time-barred, as the Unions and the Union fund trustees had knowledge of the Employer's alleged use of unit employees during the lockout well outside the Section 10(b) period;

(2) the unlawful lockout and fund contribution charges should also be dismissed because the LDSA validly waived the Unions' right to file charges arising out of the lockout, as there is no evidence that the Employer misled the Unions into signing the LDSA;

(3) the unlawful lockout and fund contribution charges should also be dismissed because there is no evidence that the Employer's use of unit employees during the lockout violated Section 8(a)(3), and any direct dealing in violation of Section 8(a)(5) was de minimis; and

(4) the 8(a)(4) charge should be dismissed because the Employer's grievance to enforce the LDSA is reasonably based and lawful under Bill Johnson's,[1] as the LDSA validly waived the Unions' right to file the charges that are the subject of the grievance.

FACTS

These charges arise out of a labor dispute involving a multiemployer/multiunion bargaining unit made up by seven locals of the UFCW ("the Unions") and three grocery retailers -- Albertsons ("the Employer"), Vons, and Ralphs. The Employer employs about 20,000 bargaining unit employees in stores throughout central and southern California, in a bargaining unit of about 70,000 employees.

The charges in the instant cases are similar to prior charges against Ralphs, which also arose out of the same 2003-2004 lockout. The charges against Ralphs resulted in Advice Memoranda dated September 20, 2004, dealing with the unlawful lockout allegations,[2] and May 4, 2005, dealing with fund contributions during the lockout.[3] The 2004 memorandum authorized dismissal of the Section 8(a)(3) allegation against Ralphs on the basis that there was no evidence that their rehiring of unit employees during the lockout was done in a discriminatory manner.[4] That memorandum also

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[1] Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

[2] Ralphs Grocery Company, Cases 31-CA-26571 et al., Advice Memorandum dated September 20, 2004.

[3] Ralphs Grocery Company, Case 31-CA-27229, Advice Memorandum dated May 4, 2005.

[4] The Unions appealed the decision to dismiss the 8(a)(3) allegation, but the 8(a)(3) and (5) lockout charge against Ralphs was ultimately dismissed as part of a separate settlement of criminal charges against Ralphs.

authorized complaint on a limited 8(a)(5) theory based on evidence that Ralphs had dealt directly with unit employees who worked during the lockout. The 2005 memorandum authorized dismissal of the fund contributions charge on the ground that the charge was time-barred under Section 10(b).[5]

The lockout that gave rise to all of these charges began in October 2003, when Ralphs and the Employer responded to the Unions' whipsaw strike against Vons by locking out all bargaining unit employees except pharmacists. After the lockout began, the Unions received information indicating that Ralphs and the Employer were employing purportedly locked-out unit employees as temporary "replacements." In December 2003 and January 2004, the Unions filed several charges against Ralphs and the Employer alleging that they were engaging in an unlawful discriminatory or selective partial lockout. The Employer asserted that it had in fact locked out all non-pharmacist unit employees, and denied that it knowingly employed any unit employees as replacements.

On February 10, 2004, at a meeting of the trustees of the Union Trust Funds, the Union trustees (who are also Union officials), stated that they had reason to believe that at least two of the grocery retailers were employing unit employees during the lockout without making contributions to the Trust Funds. The Union trustees moved to audit all three retailers. The Employer trustees opposed the motion as a block and the motion deadlocked. There is no evidence that the Unions ever attempted to get information directly from the Employer regarding the Employer's hiring practices during the lockout.

In the meantime, evidence surfaced that Ralphs was employing as replacements a number of unit employees using false names and Social Security numbers to conceal the fact that they were part of the locked-out unit. This evidence was uncovered as part of the Region's investigation of the partial-lockout charges against Ralphs, as well as a criminal investigation by the U.S. Attorney for the Central District of California.

In March 2004, while evidence about Ralphs' and the Employer's conduct during the lockout was still surfacing, all of the parties reached a global settlement agreement that included a new collective-bargaining agreement and a "Labor Dispute Settlement Agreement" ("LDSA"). Under the LDSA, the parties agreed to waive all claims, pending and

[5] The General Counsel upheld that decision on appeal.

future, arising out of the labor dispute, including "any issue, claim or litigation arising out of, or related to the strike or lockout, to the collective bargaining negotiations for a new collective bargaining agreement, or to the administration or funding of the trust funds maintained pursuant to the parties' expired 1999-2003 collective bargaining agreement." As a result of the settlement, the Unions withdrew the pending unlawful lockout charge against the Employer.

In August 2004, based on accumulating evidence that Ralphs had engaged in a surreptitious practice of knowingly hiring unit employees under false identities and documentation, the Funds' trustees agreed to an audit of all three grocery retailers. In May 2005, during sworn testimony at a state unemployment compensation hearing, an Employer manager admitted that the Employer had discovered that five unit employees had worked for the Employer during the lockout under false identities without the Employer's knowledge. The manager testified that the Employer had no knowledge of any other unit employees working during the lockout. The Employer thereafter made Trust Fund contributions on behalf of the five employees.

In October 2005, trustees discussed the preliminary results of the Funds' internal audit of the Employer, which revealed over 600 Social Security number matches between the Employer's list of temporary replacements and employees in the Trust Funds system. On October 17, 2005, the Unions refiled their 8(a)(3) and (5) unlawful lockout charge against the Employer. On November 8, 2005 the Union trustees filed a charge alleging a Section 8(a)(5) refusal to pay trust fund contributions for unit employees employed during the lockout.

The Trust Funds' own internal audit led to an independent audit by an outside accounting firm. The independent audit, concluded in February 2006, established that: (1) five unit employees used false information to work at the Employer during the lockout (these were the five employees previously identified, on whose behalf fund contributions had already been made); (2) 63 one-time Albertsons' employees who were no longer employed at the time of the lockout had been rehired as replacement employees; and (3) 64 Vons employees and 98 Ralphs employees worked for the Employer during the lockout. Thus, the independent audit eliminated the vast majority of matches preliminarily flagged by the Trust Funds' internal audit.

Unlike in the Ralphs' cases, no witnesses have been found or other evidence produced establishing that the

Employer knowingly hired a significant number of unit employees, solicited unit employees, dealt directly or had a secret hiring scheme The investigation has been unable to obtain information about the hiring circumstances of the vast majority of unit employees identified by the independent audit. Thus, the Region's attempt to independently contact employees identified in the audit yielded no more than three or four locked-out unit employees who were nonetheless knowingly hired by the Employer as replacement employees. Several other employees who worked during the lockout concealed their status as unit employees; there is no evidence that the Employer knew they were unit employees.

On March 16, 2006, the Employer filed a grievance under the LDSA alleging that the Unions' 2005 charge against the Employer violates the LDSA. The grievance seeks the Unions' withdrawal of the charge.

On May 9, 2006 the Unions filed the Section 8(a)(1) and (4) charge, alleging that the Employer's grievance unlawfully interferes with the Unions' access to the Board.

ACTION

We agree with the Region that all of the charges in the instant cases should be dismissed, absent withdrawal. Thus, we agree with the Region that:

(1) the unlawful lockout and fund contributions charges should be dismissed as time-barred, as the Unions and the Union fund trustees had knowledge of the Employer's alleged use of unit employees during the lockout well outside the Section 10(b) period;

(2) the unlawful lockout and fund contribution charges should also be dismissed because the LDSA validly waived the Unions' right to file charges arising out of the lockout, as there is no evidence that Employer misled the Unions into signing the LDSA;

(3) the unlawful lockout and fund contribution charges should also be dismissed because there is no evidence that the Employer's use of unit employees during the lockout violated Section 8(a)(3), and any direct dealing in violation of Section 8(a)(5) was de minimis; and

(4) the 8(a)(4) charge should be dismissed because the Employer's grievance to enforce the LDSA is reasonably based and lawful under Bill Johnson's, as the LDSA validly waived the Unions' right to file the charges that are the subject of the grievance.

1. The Unions' unlawful lockout charge (Case 31-CA-27552) and the Trustees' fund contributions charge (31-CA-27587) are time-barred.

Section 10(b) bars issuing complaint against conduct which occurred more than six months prior to a properly filed charge. The charges here were filed on October and November 2005, alleging unlawful conduct that occurred much more than six months earlier, i.e., between October 2003 and March 2004. The Charging Parties contend, however, that the charges are not time-barred because the Employer misrepresented or fraudulently concealed its employment of unit employees during the lockout, thereby tolling the Section 10(b) period.

The Board has made it clear that Section 10(b) may only be tolled based on charged-party conduct if three critical elements are present: (1) there was deliberate concealment; (2) the concealed facts were material to the alleged violation; and (3) the injured party was ignorant of those facts.[6] We conclude that these elements are not met here.

The Unions' claim of fraudulent concealment is based on the Employer's statements that it locked out all non-pharmacist unit employees, and that it did not engage in a secret partial lockout. There is no evidence that the Unions requested information about the Employer's hiring practices during the lockout, that the Employer refused to provide any such information, or that the Employer provided false documents about the hiring to the Union. The Unions' claim of fraudulent concealment rests, rather, solely on the Employer's denial of the alleged misconduct. It is well settled, however, that mere denial of misconduct is not an act of fraudulent concealment sufficient to toll Section 10(b).[7]

Moreover, even if the Employer's denials could be considered deliberate concealment of material facts, the Employer's denials did not prevent the Unions from gaining knowledge that some unit employees had been rehired. Here, the Unions first had notice that the Employer was employing some locked-out unit employees in early 2004, when they filed their initial unlawful lockout charge against the Employer. Indeed, by February 2004, the Union trustees,

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[6] See, e.g., Benfield Electric Co., Inc., 331 NLRB 590, 591 (2000); Browne & Sharpe Mfg. Co., 321 NLRB 924, 924 (1996).

[7] Benfield Electric, 331 NLRB at 591; Browne & Sharpe, 321 NLRB at 924.

who are also Union officials, announced their suspicions at a trustee meeting and sought an audit. Thus, the third critical element of the test for tolling Section 10(b) is not met because the injured parties were aware of the purportedly concealed facts.[8]

The Unions and their trustees contend that they were unaware of the full extent and nature of the Employers rehiring of locked-out employees until the October 2005 internal audit was completed. However, full knowledge of all of the facts surrounding an alleged violation is not required to trigger the Section 10(b) period.[9] Rather, Section 10(b) is triggered once the aggrieved party is "on notice of facts that reasonably engendered suspicion" that an alleged unfair labor practice may have been committed.[10] As demonstrated by their filing of charges and seeking an audit in early 2004, the Unions and their trustees clearly had knowledge, at that time, of facts "sufficient to create a suspicion" that unit employees were working during the lockout, and that no fund contributions were being made on their behalf.[11] Thus, consistent with our May 4, 2005, Ralphs Grocery Company Advice Memorandum, we conclude that the unlawful lockout charge and the fund contributions charge are barred by Section 10(b).

2. The unlawful lockout and fund contributions charges are covered by the LDSA.

Even if the unlawful lockout and fund contributions charges were not time-barred, we conclude that they should be dismissed because they are covered by the LDSA. Under Independent Stave Co.,[12] in determining whether to defer to a private, non-Board settlement, the Board considers all the surrounding circumstances including whether: (1) the parties have agreed to be bound; (2) the settlement is

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[8] Thus, Don Burgess Construction Co., 227 NLRB 765, 766 (1977), relied on by the Unions, is properly distinguished from the instant cases. In Don Burgess, Section 10(b) was tolled because the employer's fraudulent concealment left the union unaware of the alleged violation.

[9] See, e.g., R.P.C., Inc., 311 NLRB 232, 234 (1993).

[10] ATU Local 1433 (Phoenix Transit System), 325 NLRB 1263, 1263 n. 2 (2001). See also IBEW Local 25 (SMG), 321 NLRB 498, 500 (1996) (employee, outside 10(b) period, "possessed facts which were sufficient to create a suspicion that an unfair labor practice had occurred").

[11] IBEW Local 25 (SMG), 321 NLRB at 500.

[12] 287 NLRB 740, 743 (1987).

reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation; (3) there has been any fraud, coercion, or duress by any party in reaching the settlement; and (4) the respondent has a history of violations of the Act or has breached past unfair labor practice settlement agreements.

The Unions do not contend that the waiver of the right to file charges they executed in the LDSA should be set aside under the first, second, or fourth factors of the Independent Stave test. In any event, those three factors clearly support giving effect to the LDSA.

As to the first factor, the parties clearly agreed to be bound by its terms; they executed the agreement knowingly and conscientiously and it was the result of thorough negotiations by experienced parties and labor counsel. Moreover, the Unions entered into the agreement with knowledge of alleged violations during the lockout. Indeed, the LDSA explicitly required the Unions to withdraw the pending unlawful lockout charges against the Employer, which they did. The LDSA also explicitly waived the Unions' right to file any other charges arising out of the labor dispute.

On the second factor, the LDSA was part of a reasonable resolution of the parties' complex and multiple disputes. It was part of a global settlement that brought significant benefits to all parties. It ended the contentious contract negotiations, returned stability to the bargaining relationship, brought tens of thousands of employees back to work under mutually-established terms and conditions, and ended numerous pending legal claims between the grocery retailers and the Unions. And the fourth factor manifestly supports deferral to the LDSA, as there is no recent history of violations or breaches of settlement agreements by the Employer.

The Unions contend, however, that the waiver of the right to file charges should not be effective based on the third Independent Stave factor, i.e., because it was the product of the Employer's misrepresentation that it had not employed unit employees during the lockout. As discussed above, we have already concluded that the Employer's denial of alleged wrongdoing does not amount to fraudulent concealment. Most importantly, however, the Employer's denial did not keep the Unions from learning of the allegedly unlawful rehiring. Indeed, the Unions had already filed charges alleging an unlawful lockout, despite the Employer's denial of wrongdoing. When the Unions signed the LDSA, they agreed to withdraw those charges, and waived their right to file any future charges, with the

knowledge that the Employer may well have committed the violations that they had previously alleged in the withdrawn charges.

In these circumstances, the Unions cannot establish that they were misled or fraudulently induced into agreeing to the LDSA. Proving such fraudulent inducement is a "substantial burden," which must be based on more than simple denials of misconduct.[13] Rather, fraudulent inducement requires that the party be misled regarding the nature of the agreement or the other party's intent or interpretation of the terms.[14] There is no evidence that the Employer misled the Unions regarding the terms of the LDSA, the global settlement agreement, or the multiple claims that the parties were waiving. Likewise, there is no evidence that the Employer did not intend to keep its promises. Rather it appears that, aside from the filing of the instant charges, all parties have met their obligations under the LDSA, the new collective-bargaining agreement, and the global settlement agreement. Thus, we agree with the Region that there is no basis under Independent Stave for disregarding the LDSA as fraudulently induced, and the Unions' unlawful lockout charge should also be dismissed pursuant to the parties' private settlement.

We also agree with the Region that the union trustees' fund contributions charge should be dismissed pursuant to the LDSA. The Board has held that a charge by fund trustees to collect fund contributions is properly dismissed where the employees' union has waived the right to collect the contributions as part of a strike settlement

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[13] See ATU Local 1225 (Greyhound Lines), 285 NLRB 1051, 1057 (1987).

[14] See, e.g., Dilling Mechanical Contractors, Inc., 348 NLRB No. 6, slip op. at 7 (2006) (employer fraudulently induced settlement and withdrawal of charge where it made "illusory settlement promises" and took actions "specifically aimed at avoiding fulfilling those promises"); U.S.Steel, 340 NLRB 153, 159 (2003) (employer fraudulently induced union into private settlement by misleading union about its intention not to reinstate employee); Beverly California Corp., 329 NLRB 977, 986 (1999) (settlement set aside where employer's attorney led employees to believe that settlement would not affect employees' Board backpay claims). Cf. ATU Local 1225 (Greyhound Lines), 285 NLRB at 1056-57 (no fraudulent inducement where asserted instances of noncompliance with settlement agreement did not establish intent to deceive about willingness to comply, but rather involved "good-faith disputes of fact").

agreement.[15] Here, although the trust funds and the trustees themselves were not party to the LDSA, the Unions clearly waived the funds' and the trustees' right to collect the fund contributions at issue, leaving the funds and the trustees without a legal claim.

3. The unlawful lockout charge lacks merit.

We would further dismiss the Section 8(a)(3) and (5) unlawful lockout charge on its merits. There is no evidence that the Employer's rehiring of unit employees during the lockout was discriminatorily based on employees' union activities or support, in violation of Section 8(a)(3). Nor is there evidence that the small extent of the rehiring (arguably 167 out of a 20,000-employee complement) was aimed at undermining, or in fact undermined, the Unions or their bargaining position, tainting the entire lockout. Therefore, as in our September 20, 2004, Advice Memorandum in Ralphs Grocery Company, we agree with the Region that the Section 8(a)(3) allegations should be dismissed.

There is evidence that the Employer may have knowingly hired three or four locked-out unit employees and set their pay at the temporary replacements' rate. However, given the size of the Employer's unit complement, approximately 20,000 employees, and the scope of the lockout, involving 70,000 unit employees, any direct dealing that may have occurred was de minimis. Thus, we would not authorize complaint here even on the limited 8(a)(5) theory upon which complaint was authorized in the May 4, 2004, Advice Memorandum in Ralphs Grocery Company. Accordingly, we agree with the Region that the Unions' charge alleging the lockout as violative of Section 8(a)(3) and (5) should also be dismissed on the merits, absent withdrawal.

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[15] Food Employers Council, Inc., 293 NLRB 333, 333 & n. 2 (1989).

4. The Employer's grievance is reasonably based and does not violate Section 8(a)(1) and (4).

Finally, we agree with the Region that the 8(a)(4) charge should be dismissed because the Employer's grievance to enforce the LDSA is reasonably based and lawful under Bill Johnson's, as the LDSA validly waived the Unions' right to file the charges that are the subject of the grievance. The Board applies a Bill Johnson's analysis to the legality of grievances filed under contractual grievance/arbitration provisions because grievances are the first step in potential Section 301 lawsuits to enforce arbitrators' awards. Thus, it is well established that grievances raise analogous First Amendment concerns as arise in lawsuits.[16] Thus, under Bill Johnson's, a grievance may be condemned as an unfair labor practice only if it has no reasonable basis in fact or law and is filed with a retaliatory motive.[17]

Here, the Employer's grievance attacks the Unions' unlawful lockout charge as a violation of the LDSA, based on the LDSA's explicit language containing a clear and unmistakable waiver of the right to file charges. As discussed above, we agree with the Region that the LDSA validly waived the Unions' right to file charges over the lockout. Thus, the grievance is reasonably based. As such, the Employer's grievance is lawful under Bill Johnson's and the Unions' charge attacking the grievance should be dismissed, absent withdrawal.[18]

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[16] ILWU Local 7 (Georgia-Pacific Corp.), 291 NLRB 89, 93 (1988) (applying Bill Johnson's to determine that a union's grievance was not an unfair labor practice). See also Manufacturers Woodworking Assoc., 345 NLRB No. 36, slip op. at 3 (2005) (applying Bill Johnson's to a demand for arbitration filed under contractual grievance/arbitration provision).

[17] Manufacturers Woodworking Assoc., 345 NLRB No. 36, slip op. at 3.

[18] We recognize that, in some instances, charges over reasonably-based claims should be held in abeyance pending the result of the claim, pursuant to GC Memorandum 02-09, "Case Handling Instructions for Cases Concerning Bill Johnson's Restaurants and BE&K Construction Co.," dated September 20, 2002. Given our conclusion in the instant cases that the LDSA is a valid waiver and the grievance is likely meritorious, however, there would be no purpose to waiting for the outcome of the grievance.

Accordingly, for the reasons set forth above, the Region should dismiss all of the charges in the instant cases, absent withdrawal.

B.J.K.